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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL ENRIQUE DIAZ, Defendant and Appellant.	A101811 (San Mateo County Super. Ct. No. SC051114)

A jury convicted Miguel Enrique Diaz of attempted murder, assault, infliction of corporal injury on a former cohabitant, false imprisonment, dissuading a witness, burglary, three counts of arson and one of attempted arson, making criminal threats, battery on a peace officer, resisting a peace officer, and stalking. The court sentenced Diaz to life in prison with the possibility of parole, plus a consecutive term of 9 years, 8 months.

On appeal, Diaz claims (1) San Mateo County was an improper venue for the trial of certain counts; (2) the prosecutor committed misconduct in closing argument; and (3) the court committed *Blakely* error in sentencing. (*Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531] (*Blakely*).) We affirm.

BACKGROUND

Diaz and Jane Doe began seeing each other in January 1999. For a while they shared an apartment, but in October 2000 the relationship began to sour. Diaz was using drugs. Doe moved out in March 2001, but continued to provide Diaz with financial assistance and maintained a friendship with him. In July 2001, Doe was living in

South San Francisco and Diaz in San Francisco. Diaz called Doe around 7:00 a.m. on the morning of July 12. He told her to come to his residence, because he was going to ram her parents' house with a car. Doe's sister L.P. lived with her parents. L.P. had initially introduced Diaz and Doe, and Diaz had been expressing animosity toward L.P.

Doe went to meet Diaz, picked him up, and drove him to the drug program he was attending. However, Diaz refused to get out of the car, and Doe drove him around San Francisco and eventually took him home. She tried to leave, but he took her keys. They went to his room, where he took drugs. They drove around the city again, during which time Diaz showed Doe two knives he was carrying and threatened to "do something to the police, so the police would shoot him." Diaz also attempted to steer the car into a pole, but Doe slammed on the brakes. At one point while Diaz was driving, he threatened to ram Doe's ex-husband's house, but drove Doe home instead. There, he took a kitchen knife and tried to force Doe to push the knife into him. Finally, he left in Doe's car. She filed a police report.

Also on July 12, 2001, Diaz began harassing Doe's sister L.P. with phone calls, threatening her daughters and her family. Doe learned about these calls and was angry, but continued to try to be a friend to Diaz, helping him move and get into another drug program. However, in September Doe told Diaz she was tired of helping him, and asked him to stop contacting her and her sister. A few weeks later, Diaz came to her apartment, but she refused to speak to him. That night, someone broke her car windows. In October, L.P. obtained a restraining order against Diaz after he went to her daughters' school and shouted threats, which were relayed to her daughters.

Around 5:00 a.m. on November 17, 2001, L.P. was awakened in her ground floor apartment at the family home by "a banging and then like running around upstairs." She ran upstairs, where her brother had dialed 911. He told her her car and the house were on fire; L.P. looked out the window and saw her car, parked in the driveway, in flames as well as the garage door in front of it. An arson investigator concluded the fire had been set with gasoline at three separate points, one on the garage door and two at the front of the car.

Around 5:15 a.m. on the same morning, Doe was awakened by knocks on her window and door. She saw Diaz through the sliding glass door, and told him she did not want to talk to him. However, when he said he had one of her sons, she let him in. He began pouring a container of gasoline in the living room. Doe ran to the bedroom to call 911. Diaz pursued her, took the phone away, threw her on the bed, and choked her. He told her he had gone to L.P.'s house and "poured gasoline over there" or "set fire" (in her testimony, Doe could not recall his words exactly). Doe managed to get away, then saw Diaz throw something into the living room, which immediately burst into flame. Doe called 911 again, as Diaz shut the bedroom door.

Doe tried to open a window to escape, but Diaz pulled her back three or four times. He told her they would both die there. Doe managed to break the window, and heard a neighbor shouting. She crawled out, with Diaz climbing on top of her. Diaz began to rush away, but stumbled, caught himself, and walked normally toward the front of the building. The neighbor's son, a recent graduate of the California Highway Patrol Academy, was in the driveway and saw Diaz walk around the corner of the building. The officer identified himself and ordered Diaz to get down. Diaz did not comply, and struggled when the officer grabbed him, but with the assistance of another neighbor Diaz was restrained until the South San Francisco police arrived to arrest him.

Doe's car, parked nearby on the street, was found with gasoline poured over it.

DISCUSSION

1. *Venue*

Before trial, Diaz moved to dismiss two arson charges and a stalking charge on the ground that these crimes were alleged to have been committed against L.P. within the City and County of San Francisco, and thus venue was improper in San Mateo County. The court denied the motion, ruling that the events in the two counties were "connected and part and parcel . . . of the same motivation and the same intent and the same activity."

Penal Code section 781[1] provides: "When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory."

Diaz acknowledges that section 781 is "construe[d] . . . liberally in order to achieve its underlying purpose, which is to expand venue beyond the single county in which a crime may be said to have been committed [citations]—consistently, of course, with 'protect[ing] a defendant from being required to stand trial in a distant and unduly burdensome locale' [citation]." (*People v. Posey* (2004) 32 Cal.4th 193, 218-219 (*Posey*).) However, he contends the crimes against L.P. involved no "preparatory acts" or "preparatory effects" sufficient to establish a connection to San Mateo County. (*Id*. at p. 219.)

We disagree. The offenses against L.P. may reasonably be regarded as "preparatory" to Diaz's ultimate purpose of exacting revenge against Doe. He told Doe about the arson he had just committed at L.P.'s residence, in order to further terrorize her during the attack in her home. It has long been established that "the phrase [in section 781], 'or requisite to the consummation of the offense', means requisite to the completion of the offense—to the achievement of the unlawful purpose—to the ends of the unlawful enterprise. By the use of the word 'consummation' the Legislature drew a distinction between an act or an effect thereof which is essential to the commission of an offense, and an act or effect thereof which, although unessential to the commission of the offense, is requisite to the completion of the offense—that is, to the achievement of the unlawful purpose of the person committing the offense." (*People v. Megladdery* (1940) 40 Cal.App.2d 748, 775, disapproved on other grounds in *People v. Simon* (2001) 25 Cal.4th 1082, 1108, and in *Posey*, *supra*, 32 Cal.4th at pp. 212-213; accord, *People v. Williams* (1973) 36 Cal.App.3d 262, 268.)

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[1] Further statutory references are to the Penal Code.

Thus, although Diaz's attack on Doe in San Mateo County was not essential to the completion of his earlier crimes in San Francisco, the San Mateo crimes were the "consummation" of the criminal enterprise on which he embarked in San Francisco. It makes no difference, for purposes of venue, that the San Francisco crimes were technically completed before the San Mateo crimes. (*People v. Williams*, *supra*, 36 Cal.App.3d at p. 269.) As the trial court observed, all the crimes were interconnected. Section 781 is applied in a "commonsense manner with due regard to the factual circumstances of the case rather than technical niceties." (*People v. Williams*, *supra*, 36 Cal.App.3d at p. 268.)

Diaz contends any effects on Jane Doe resulting from the crimes against her sister were too tenuous to justify venue in San Mateo County. He argues that in *Posey*, *supra,* 32 Cal.4th 193, the Supreme Court held a subjective intent to harm someone in the forum county irrelevant to the venue analysis. However, the Supreme Court's point in *Posey* was that section 781 does not require "the defendant [to] possess any mental state whatever with respect to a county, for purposes of venue. The requirement of 'effects' in a county 'requisite to the consummation' of a crime satisfies the need for a reasonable relationship between the crime and the county . . . ." (*Posey*, *supra*, at p. 220.) Thus, it did not matter whether Diaz knew that Doe and L.P. lived in different counties. What mattered was that he knew he could get back at Doe by harassing and committing arson against her sister.[2]

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[2] We acknowledge that the *Posey* court, in a passage not quoted by Diaz, stated: "Under section 781, venue turns on the presence or absence, in a county, of acts or effects constituting the crime or requisite to the commission of the crime—*not on the defendant's state of mind* or on the soundness of any beliefs that he or she might hold as to the location of those acts or effects." (*Posey*, *supra*, 32 Cal.4th at p. 221, italics added.) *Posey* did not involve a situation where criminal acts committed in different counties were linked by the defendant's unlawful purposes. We do not believe the language quoted *ante* was intended to cast doubt on the reasoning in cases like *People v. Williams*, *supra*, 36 Cal.App.3d at pp. 268-269.

Diaz was not unduly burdened by standing trial in San Mateo instead of in neighboring San Francisco County. (*Posey*, *supra*, 32 Cal.4th at pp. 221-222.) The trial court properly refused to dismiss the charges involving crimes against L.P.

2. *Closing Argument*

Diaz argued below that his voluntary intoxication prevented him from forming the mental state required by the specific intent crimes against Doe. In rebuttal, the prosecutor contended: "That is not a defense to a crime, because you choose to take cocaine. That is not a defense. They have to argue that he was under the influence to such a degree that he does not know what he is doing—" Defense counsel interrupted at this point, protesting "that is not the law, that is not what the instruction says. Misleading." The following exchange ensued:

"THE COURT: Would you repeat what you said?

"[THE PROSECUTOR]: My statement was that merely being under the influence of a drug is not a defense to a crime.

"[DEFENSE COUNSEL]: What she said was being under the influence of cocaine is not a defense to the crime and the instruction clearly says that if it is an intoxicant, it is.

"THE COURT: Well, the law says that in considering whether or not the defendant formed a specific intent required by crimes, you can consider whether or not he was under the influence of an intoxicant.

"[DEFENSE COUNSEL]: 4.21.1

"THE COURT: On intoxication, you have to determine what, if any, influence intoxication would have on him in his forming of the required specific intent.

"So being under the influence of a drug, are you arguing this is the same as intoxication?

"[DEFENSE COUNSEL]: I am saying the statement [the prosecutor] made is not accurate.

"THE COURT: Well, it is up to the jury to determine that he was intoxicated. Being under the influence of a drug does not necessarily mean intoxication. There are different levels of that.

"Why don't you go ahead.

"[THE PROSECUTOR]: Okay.

"In using the intake of drug, or some kind of intoxicating substance into the body the question is: Did it affect the person's cognitive process so that the person did not have the specific intent required by some of the crimes?"

Diaz claims it was misconduct for the prosecutor to misadvise the jury that the defense had to show he did not know what he was doing in order for voluntary intoxication to be considered in connection with the formation of specific intent. Even if there was a cognizable error here, it was far from prejudicial.

Defense counsel did not appear to object to the prosecutor's comment regarding Diaz knowing what he was doing—his specific objection was limited to her remark that voluntary intoxication is not a defense. That statement, however, was correct. (*People v. Saille* (1991) 54 Cal.3d 1103, 1120; *People v. San Nicolas* (2004) 34 Cal.4th 614, 669.) "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—*and on the same ground*—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841, italics added; accord, e.g., *People v. Cunningham* (2001) 25 Cal.4th 926, 1000.)

In any event, the comment Diaz now assails was hardly a gross distortion of the correct rule, which was explained by the trial court. That explanation quickly cured any possible misunderstanding the comment may have caused.

3. *The Blakeley Issues*

The court imposed an aggravated base term of 8 years for the arson of L.P.'s residence, based on a finding that "the crime involved a threat of great bodily harm in setting the fire and, in that fashion, disclosed a high degree of cruelty, viciousness and callousness." For the arson of L.P.'s car, the stalking of L.P., and the attempted arson of

Doe's car, the court imposed consecutive determinate terms based on a finding that "the manner in which the [crimes were] carried out indicates plan, sophistication or professionalism." The court ran the determinate terms consecutive to the indeterminate life sentence based on a finding that "the crimes involve[d] separate acts of violence or threats of violence . . ." and "were committed at . . . separate places."

In supplemental briefing, Diaz contends the findings noted above ran afoul of *Blakely, supra,* 124 S.Ct. 2531. There, the United States Supreme Court reaffirmed and extended the rule stated in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at p. 490; *Blakely*, *supra*, 124 S.Ct. 2531, 2536.) The "statutory maximum" for *Blakely* purposes is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely*, *supra*, 124 S.Ct. at p. 2537, italics omitted.)[3]

The Attorney General argues that Diaz forfeited his *Blakely* claims by not objecting at the sentencing hearing. We disagree. Sentencing issues arising under *Blakely* implicate the fundamental constitutional right to have a jury determine the facts on which a sentence is based. (*Blakely*, *supra*, 124 S.Ct. at p. 2543 ["every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment"]; see *People v. Vera* (1997) 15 Cal.4th 269, 276-277.) A sentence violating the *Blakely* rule "exceeds [the] proper authority" of the sentencing judge and is "invalid" under the Sixth Amendment to the federal Constitution. (*Blakely*, *supra*, at pp. 2537-2538.) It might be appropriate to require defendants to preserve their claims for

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[3] Presently pending before the California Supreme Court are cases raising the questions whether *Blakely, supra,* 124 S.Ct. 2531, precludes a trial court from making findings on aggravating factors in support of an upper term sentence, and if so, what prejudicial error standard applies (*People v. Towne*, review granted July 14, 2004, S125677); and whether *Blakely* affects the imposition of consecutive sentences (*People v. Black*, review granted July 28, 2004, S126182).

appeal by objecting at sentencing hearings held after *Blakely*; that issue is not before us. But before *Blakely*, we are inclined to believe *Apprendi* objections would have been futile. In any event, we have discretion to consider issues that have not been formally preserved for review. (*People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6; *People v. Smith* (2003) 31 Cal.4th 1207, 1215.)

A. *The Aggravated Term*

The Attorney General disputes *Blakely*'s application to California's determinate sentencing scheme, arguing that the Legislature has established maximum terms and a defendant is never "entitled" to anything less than the maximum. (See *Blakely*, *supra*, 124 S.Ct. at p. 2540 [whether defendant has legal right to lesser sentence is critical in determining whether judge has usurped jury's role].) This argument is untenable in view of section 1170, subdivision (b): "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. . . ." Thus, at sentencing, the defendant is entitled to receive the middle term unless there are aggravating factors. Under *Blakely*, the jury must determine those factors. (*Blakely*, *supra*, at p. 2543.)[4]

Diaz contends *Blakely* error is structural, requiring reversal per se. We disagree. Our Supreme Court has ruled that the *Chapman* test applies to *Apprendi* error. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326; *Chapman v. California* (1967) 386 U.S. 18, 24.) Diaz offers no distinction that might justify a different standard of review for *Blakely* error. Thus, we consider whether the failure to obtain jury findings on aggravating factors was harmless beyond a reasonable doubt. We believe it was. Diaz

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[4] Recently, the United States Supreme Court extended its Sixth Amendment analysis in *Apprendi, supra,* 530 U.S. 466 and *Blakely, supra,* 124 S.Ct. 2531, to the selection of sentences under the federal guidelines. The court concluded that the mandatory nature of the guidelines was incompatible with the constitutional jury trial requirement as construed in *Blakely*. (*United States v. Booker* (2005) __ U.S. __ [125 S.Ct. 738, 2005 DAR 410, 414, 421] (*Booker*).) The question of *Booker*'s effect on *Blakely*'s application to California law is not now before us.

discounts the threat of great bodily injury involved in setting a "small fire against L.P.['s] garage door." However, no reasonable jury would disagree that this arson, committed early in the morning when the occupants of the residence could be expected to be sleeping, as an act of retribution for a failed relationship with the victim's sister, involved at a minimum a "high degree of cruelty, viciousness, or callousness."[5] Diaz was not prejudiced by the *Blakely* error.

B. *Consecutive Terms*

The Attorney General also contends the *Blakely* rule does not apply to the determination to impose consecutive terms. We agree. That choice is made only after the defendant has been found guilty of separate crimes beyond a reasonable doubt. No "statutory maximum" is violated if the defendant serves his terms consecutively. Unlike section 1170, subdivision (b), the statute governing consecutive sentencing has no provision mandating concurrent terms in the absence of aggravating factors. (§ 669.) Thus, a defendant who commits separate crimes has no legal right to concurrent sentences "—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely*, *supra*, 124 S.Ct. at p. 2540.) Diaz's consecutive sentences did not implicate the concerns addressed in *Blakely*.

DISPOSITION

The judgment is affirmed.

_____
Parrilli, J.

We concur:

_____
McGuiness, P.J.

_____
Corrigan, J.

[5] We note also that at least one other aggravating factor was established beyond any reasonable doubt: "The defendant has engaged in violent conduct which indicates a serious danger to society." (Cal. Rules of Court, rule 4.421, subd. (b)(1).)